

## **RECENT NOTABLE REMANDS**

### **Submission of Documentation on Appeal.**

In the previous decision, the Commission vacated the final Agency decision which found that Complainant had not been discriminated against. The Commission noted that the Agency had not shown that it had properly served Complainant with the notice of her right to request a hearing. There was no evidence that Complainant received notice of her right to request a hearing at the time the Report of Investigation was issued, and the Agency did not address the issue of Complainant's outstanding hearing request before issuing its final decision. In its request for reconsideration, the Agency provided evidence for the first time which demonstrated that Complainant had in actuality received the notice. The Commission ultimately denied the Agency's request for reconsideration, finding that it would be improper to consider evidence that was available at the time of the initial appeal, but which was not provided by the Agency at that time. The Commission noted that Agencies are required to send the complete complaint file upon notification that an appeal has been filed, including the report of investigation and any supporting documentation such as correspondence sent to Complainants and proof of receipt. While the Agency argued that the Commission was newly imposing a requirement to document information sent to Complainants and the contents of what was sent, the Commission stated that the requirement was already in place. **Lawson v. Dep't of Agric., EEOC Request No. 0520110446 (October 28, 2011).**

### **Election to Pursue Grievance Process.**

Complainant filed a formal EEO complaint alleging that the Agency discriminated against him on the bases of his race, national origin and color when it did not select him for a Maintenance Worker position. The Agency dismissed the complaint on the grounds that the union had filed a grievance with regard to the selection for that position. On appeal, the Commission found that the Agency failed to conclusively prove that Complainant elected to pursue the grievance process. According to the record, the union filed a grievance on behalf of 10 employees who were not selected for the position in question, including Complainant. The Commission stated, however, that there was no evidence that Complainant participated in the grievance or authorized the union to act on his behalf. **Robbins v. Dep't of Veterans Affairs, EEOC Appeal No. 0120112612 (January 13, 2012).**

Complainant filed a formal EEO complaint alleging, among other things, that the Agency retaliated against him when it issued him a letter of reprimand regarding a safety issue. The Agency dismissed the matter, stating that Complainant had previously raised the claim in a negotiated grievance procedure. On appeal, the Commission found that the dismissal was improper. Complainant stated that the union filed a grievance without his knowledge. Further, there was no evidence in the record that Complainant was involved in filing the grievance. The Commission noted that an agency cannot deny a complainant his statutory and regulatory right to file an EEO complaint because the union exercised its right to file its own grievance pursuant to the terms of a Collective Bargaining Agreement. Thus, the matter was remanded to the Agency for further processing. The Commission affirmed the Agency's dismissal of an allegation

concerning the posting of Complainant's EEO contact information, finding that the matter stated the same claim as that raised in a prior complaint. **Callahan v. Dep't of the Interior, EEOC Appeal No. 0120110309 (January 5, 2012).**

Complainant filed a formal EEO complaint alleging that the Agency discriminated against him when it did not select him for an Electronic Mechanic position. The Agency dismissed the complaint stating that Complainant elected to raise the matter in a negotiated grievance procedure. On appeal, the Commission found that the dismissal was improper. The Commission noted that the union filed a grievance on behalf of all "Repromotion Eligible Employees." While the grievance challenged two Electronic Mechanic selections, there was no evidence that Complainant elected to file a grievance on this matter. Further, the union's grievance was not filed on Complainant's individual behalf, and his name did not appear in the grievance. Thus, the Agency failed to prove that Complainant elected to pursue the matter through the grievance process prior to filing his EEO complaint. **Cate v. Dep't of the Army, EEOC Appeal No. 0120110083 (November 21, 2011).**

### **Agency Failure to Provide Information.**

Petitioner worked for the Agency as a Management and Program Analyst. In 2003, he filed a formal EEO complaint with regard to a non-selection. The individual who was selected for the position became Petitioner's Supervisor. The Agency subsequently issued Petitioner a 30-day suspension for providing certain information to the EEO Investigator and his attorney. Petitioner filed a mixed case appeal with the Merit Systems Protection Board (MSPB) alleging that the Agency retaliated against him when it issued him the suspension. The MSPB AJ issued an initial decision finding reprisal discrimination. The full Board granted the Agency's petition for review and reversed that finding. The Commission's decision on the prior petition for review found that Petitioner established a prima facie case of reprisal, and that the Agency articulated a legitimate, nondiscriminatory reason for the suspension, that is Petitioner violated a conduct standard by improperly disclosing government information during the EEO process. With respect to pretext, however, the Commission found that the record was not developed as to whether the Agency would have issued the suspension absent a retaliatory motive. The Commission remanded the matter to the MSPB for additional comparator evidence, with specific instructions to the Agency to provide evidence of how it disciplined other employees who violated the same conduct standard. On remand, the Agency submitted a copy of its standards of conduct, as well as documentation concerning two employees who were disciplined for disclosing information during the EEO complaint process. Petitioner submitted documentation concerning a Manager who Petitioner stated had not engaged in EEO activity and was not disciplined for similar disclosures. The Agency noted that it confined its comparator evidence to that which was actually considered in suspending Petitioner, and that Petitioner was aware of other instances when employees were disciplined for unauthorized disclosure of information which did not involve the EEO complaint process.

After reviewing the supplemented record, the Commission differed with the MSPB's final decision and found reprisal discrimination. The Commission noted that the purpose of remanding the matter to the Agency was to supplement the record which was devoid of comparative treatment evidence. The Commission stated that the Agency was instructed to

provide evidence regarding how it disciplined other employees who violated the standards of conduct concerning the disclosure of information. The Commission noted that the Agency elected not to provide the information even though it was apparently aware of existing, relevant comparative treatment evidence. Instead, the Agency merely asserted, without proof, that it had disciplined employees for similar violations that did not occur in the EEO process without providing further information about those cases. The Commission found that the Agency failed to comply with the explicit order to produce comparative treatment evidence showing the types of discipline other employees received for similar infractions. Thus, the Commission exercised its discretion to sanction the Agency for its noncompliance, drawing an adverse inference that the requested comparative evidence would have reflected unfavorably on the Agency by showing that the Agency disciplined employees for unauthorized disclosure of government information more harshly when such disclosure occurred in the EEO process. The Commission then found that drawing such an adverse inference against the Agency was sufficient to establish pretext for Petitioner's retaliation claim. Specifically, the Commission determined that the Agency failed to provide any evidence of non-EEO uses of government information it considered unauthorized. The only evidence in the record reflected that the Agency considered the disclosure of such information and documents in the EEO process, to an EEO Investigator and to an attorney, to be unauthorized. The Commission remanded the case to the MSPB to consider all remedies appropriate with a finding of reprisal under Title VII. **Smith v. Dep't of Transp., EEOC Petition No. 0320080085 (March 21, 2012).**

Complainant alleged that the Agency discriminated against her in reprisal for prior protected EEO activity when it issued her an official reprimand, and placed her on a performance assistance plan. The Agency dismissed the complaint for having previously raised the matters in a grievance. On appeal, the Commission found that the Agency, despite multiple requests, had failed to produce the complaint file. Noting that the Agency did not meet its burden of providing sufficient evidence or proof to support its final decision, the Commission remanded the case for continued processing. **Lundy v. Soc. Sec. Admin., EEOC Appeal No. 0120080213 (October 28, 2011).**

The parties entered into a settlement agreement which provided, among other things, that the individual who was alleged to have harassed Complainant (Respondent) would not be assigned to Complainant's facility. Complainant subsequently notified the Agency that she believed it had breached the agreement because the Respondent had repeatedly been at her facility. On appeal, the Commission noted that while the Agency found that it did not breach the settlement agreement, the Agency failed to include copies of the affidavits referenced in their decision in the complaint file. Further, while the Agency stated, in response to a second request for the affidavits, that the person who prepared the breach response had retired, the Agency failed to indicate why the affidavit, if prepared before the decision was issued, was not available. Thus, the Agency failed to support its finding, and the Commission concluded that the Agency was in breach of the agreement. The Agency was ordered to specifically implement the terms of the agreement by ensuring that the Respondent was kept away from Complainant's facility and from any contact with her. **Fulton v. U.S. Postal Serv., EEOC Appeal No. 0120111380 (November 1, 2011).**

### **Terms of a Settlement Agreement**

Complainant and the Agency entered into a settlement agreement on July 12, 2011, that provided, in pertinent part, that the Agency would reassign Complainant from the Contracting section to the Transportation section. After receiving a letter from Complainant, the Agency issued a final decision finding that it had complied with the terms of the agreement. Specifically, the Agency stated that it reassigned Complainant prior to the execution of the settlement agreement. On appeal, the Commission found that the settlement agreement was void for lack of consideration, stating that the Agency only provided as consideration something it had previously provided. The Commission noted that the Agency acknowledged that it had already transferred Complainant to the Transportation section, and, as such, incurred no legal detriment as a result of the settlement agreement. **Pagan-Nunez v. Dep't of the Army, EEOC Appeal No. 0120120257 (February 27, 2012).**

The parties entered into a settlement agreement that provided, in pertinent part, that Complainant would be a PTF Mail Handler “currently awaiting PTR position in Clerk Craft,” and that management would continue to communicate with her. On appeal, the Commission found that the settlement agreement was void due to a lack of consideration, and being too vague to enforce. The Commission stated that the agreement, specifically the provision regarding communication, provided Complainant with nothing beyond that which the Agency was already obligated to do. In addition, there was no substantive Agency obligation, and the agreement, at best, provided only an illusory benefit to Complainant. The Commission found that the Agency did not set a time frame for placing Complainant into a PTR position, and did not specifically state that Complainant would even be entitled to such a position when one became available. **Williams v. U.S. Postal Serv., EEOC Appeal No. 0120112195 (February 24, 2012).**

Complainant and the Agency entered into a settlement agreement which provided that the Agency would afford Complainant “all opportunities as all other employees for consideration for promotions, details, assignments, and other appropriate personnel actions.” Complainant subsequently notified the Agency that it was in breach of the agreement. Specifically, Complainant stated that a Manager was unwilling to consider her for detail assignments. On appeal, the Commission found that the agreement was unenforceable and void for lack of consideration. The agreement provided Complainant with nothing more than that to which she was already entitled as an employee, and so she received no consideration with respect to the agreement. The Agency was ordered to resume processing the underlying EEO complaint. **Peters v. U.S. Postal Serv., EEOC Appeal No. 0120102922 (November 3, 2011).**

Complainant and the Agency entered into a settlement agreement resolving Complainant’s claim that the Agency discriminated against him when it failed to select him for an Administrative Law Judge (ALJ) position. The agreement specified several conditions under which Complainant would be given priority consideration for an ALJ position in a named Agency office. Complainant alleged that the Agency breached the agreement when it filled several ALJ positions in the office but did not consider him. On appeal, the Commission concluded that the agreement was deficient as a matter of policy and law. The Commission noted that while the agreement provided for Complainant to receive priority consideration for one ALJ position, the

agreement also stated that priority consideration was to be provided when a vacancy “is determined solely by [the Agency] to exist.” Thus, the threshold condition for Complainant’s eligibility to receive priority consideration was completely within the Agency’s control, and only the Agency could determine what qualified as a vacancy. The Commission noted that nothing precluded the Agency from disregarding the commonly understood conceptions of what a vacancy was, and the Agency conceded that the agreement allowed it to place an individual in an “unencumbered” ALJ position while it declined to recognize the position as a vacancy for purposes of the settlement agreement. The Commission found the Agency’s promise to be illusory such that the entire agreement was void for lack of adequate consideration. The Agency was ordered to reinstate the underlying complaint for processing. The Commission declined to address Complainant’s allegations concerning actions which occurred subsequent to his appeal, noting that he could seek to amend his complaint if he wished to do so. **Davidson v. Soc. Sec. Admin.**, EEOC Appeal No. 0120100016 (October 25, 2011), **request for reconsideration denied**, EEOC Request No. 0520120150 (May 25, 2012).

### **Stating a Claim**

**Kereem v. State**, EEOC Request No. 0520110069 (April 26, 2012).

**Macy v. Dept. of Justice**, EEOC Appeal No. 0120120821 (April 20, 2012).

**Veretto v. U.S. Postal Serv.**, EEOC Appeal No. 0120110873 (July 1, 2011). Complainant claimed that he had been subjected to a hostile work environment based on his sex. He alleged that subsequent to an announcement appearing in the local paper that complainant was going to be married to his male partner, he was subjected to harassment by another male coworker. The agency dismissed for failure to state a claim, finding that complainant was filing a complaint based on sexual orientation, and therefore was not covered under Title VII, and also dismissed parts of the complaint for untimeliness. The decision found that the agency had improperly fragmented the claim of harassment. It also found that Complainant had alleged a “plausible sex stereotyping case,” in that he claimed that the coworker’s motivation was “the sexual stereotype that marrying a woman is an essential part of being a man” and “attitudes about stereotypical gender roles in marriage.” The decision cited the District Court opinion in **Schroer v. Billington** (Library of Congress), 577 F. Supp. 2d 293 (D.D.C. 2008) (decision to withdraw job offer from transsexual applicant constituted sex stereotyping in violation of Title VII).

**Castello v. U.S. Postal Serv.**, EEOC Request No. 0520110649 (December 20, 2011). Complainant’s allegation that the Agency subjected her to a hostile work environment when a Manager made an offensive and derogatory comment about Complainant having relationships with women stated a plausible sex stereotyping case. The Commission noted that while Title VII’s prohibition of discrimination does not explicitly include sexual orientation as a basis, Title VII does prohibit sex stereotyping discrimination. In this case, Complainant essentially argued that the Manager was motivated by the sexual stereotype that having relationships with men was an essential part of being a woman, and made a negative comment based upon Complainant’s failure to adhere to this stereotype.

## **Retaliation**

**Bryant v. Dep't of Justice, EEOC Appeal No. 0120113916 (January 31, 2012)** Complainant's claim that the Agency targeted him for investigation by the Office of Professional Responsibility because of his prior EEO activity stated a viable claim. Complainant was not challenging the results of the investigation or the process itself, and his allegations, if true, could have a chilling effect on an employee's willingness to engage in the EEO process.

**Guice v. U.S. Postal Serv., EEOC Appeal No. 0120113857 (January 30, 2012)** Complainant stated a viable claim of discriminatory/retaliatory harassment. While the Agency defined the claims as only alleging that she was placed on the "deems desirable" list without prior notification, Complainant specifically referenced her "pre-complaint" when asked to explain her claim. The EEO Counselor's report shows that in addition to the "deems desirable" list, Complainant indicated that she was having difficulty with her leave, management was not accommodating her medical restrictions, and she was placed off work. The Commission stated that those allegations, raised during counseling and incorporated by reference in the formal complaint, stated an ongoing claim of harassment.

**Simmons v. Dep't of the Army, EEOC Appeal No. 0120111275 (December 9, 2011)** Complainant's allegations that the Agency discriminated against him when it assigned him a heavier workload than other employees, and did not provide him with an opportunity to apply for a more desirable position stated a viable claim of retaliation. Examining the allegations together and in the light most favorable to Complainant, the claims were sufficiently adverse and would dissuade a reasonable person, under the same circumstances, from making or supporting a claim of discrimination.

## **Harassment**

**Montgomery v. Dep't of Transp., EEOC Appeal No. 0120113892 (January 24, 2012)** Complainant's allegations that the Agency's Administrator treated her in a demeaning, threatening, and abusive manner for approximately 18 months, and did not upgrade her position to the SES level stated a viable claim of discriminatory harassment. The Agency improperly separated the two issues and examined them separately. When viewed in the context of the claim of harassment, the matters state a claim of hostile work environment harassment.

**Dykes v. U.S. Postal Serv., EEOC Appeal No. 0120111438 (January 13, 2012)** The Agency improperly dismissed Complainant's complaint for failure to state a claim. While the Agency analyzed Complainant's allegations as discrete acts, Complainant's assertions that she was not allowed to perform certain duties or have a "no lunch" workday, had her starting time changed, and was asked to provide documentation for the use of a cane stated an actionable claim of discriminatory harassment).

**Kenawy v. Dep't of Veterans Affairs, EEOC Appeal No. 0120113725 (January 13, 2012)** Complainant's allegations that his Chief micro-managed his assignments, delayed his access to a necessary database, and failed to assign him acting Chief duties, when considered with his

assertion that he received slanderous e-mails and had his staff reduced, stated a viable claim of discriminatory harassment. If true, such behavior could reasonably interfere with Complainant's work performance and create a hostile work environment.

**Ballard-Collins v. Dep't of the Army, EEOC Appeal No. 0120120047 (March 6, 2012)**

Complainant alleged a series of tangible and intangible actions, including her Supervisor denying her requests for compensatory time, accusing her of falsely requesting compensatory time, drafting a disciplinary action against her, and refusing to correct the leave calendar, which stated a viable claim of hostile work environment harassment. The Agency improperly treated the matters raised in the complaint in a piecemeal manner instead of as incidents supporting a single claim of ongoing harassment); see also McCarty v. U.S. Postal Serv., EEOC Appeal No. 0120114329 (March 9, 2012) (the Agency improperly fragmented Complainant's claim and dismissed parts of it on various procedural grounds. When viewed together, Complainant's claim that he was subjected to consecutive disciplinary actions and false accusations, and denied work based on a perceived medical condition, were part of a series of alleged discriminatory and retaliatory events that alleged an ongoing pattern of harassment.

**Vaughan v. Dep't of Transp., EEOC Appeal No. 0120114326 (March 5, 2012)** The Agency improperly dismissed Complainant's claim that, after she was questioned about her religion, she was subjected to a hostile work environment by her Supervisor. Complainant provided a lengthy narrative of incidents concerning her Supervisor which were sufficient to state a claim of discriminatory harassment; see also Knight v. Dep't of Veterans Affairs, EEOC Appeal No. 0120114187 (March 5, 2012) (Complainant's allegation that her Supervisor made negative comments to her, issued her an unacceptable mid-year performance evaluation and a proposed admonishment, and accused her of insubordination stated a viable claim of discriminatory harassment).

**Penarendondo v. Dep't of the Army, EEOC Appeal No. 0120120037 (March 8, 2012).**

Complainant contacted an EEO Counselor on March 8, 2011., and subsequently filed a formal complaint alleging that two Supervisors subjected him to ongoing discriminatory harassment. Complainant cited several specific incidents, including a February 15, 2011 mid-year performance counseling, in support of his claim. He also stated that, after he testified as a witness in a co-worker's EEO complaint, he was subjected to additional retaliatory harassment. The Agency defined Complainant's complaint as including six specific incidents, and dismissed two allegations for failure to state a claim, one allegation as being moot, and four allegations for untimely EEO Counselor contact. On appeal, the Commission stated that the Agency improperly split Complainant's claim of harassment into separate events and treated them in a piecemeal manner. The Commission then found that, in viewing the events as a single claim of harassment, Complainant contacted the EEO Counselor well within 45 days of the most recent event. In addition, while the record showed that the performance counseling document had been removed from Complainant's records, the Commission stated that the counseling was part of the larger claim of harassment. Finally, the Commission found that, when all of the incidents were viewed in the context of Complainant's complaint of harassment, they stated a viable claim. The Commission noted that this was particularly true in the context of Complainant's retaliation claim. Thus, the entire complaint was remanded to the Agency for further processing. .

**Green v. Dep't of Veterans Affairs, EEOC Appeal No. 0120113115 (November 7, 2011)**

Complainant's allegations that his second level Supervisor did not provide him with office communication, access to e-mail, a computer, or a personal workspace, and spoke to him in a condescending tone, and yelled at him, and that his first level Supervisor warned him about his attire while allowing other employees to dress in a similar fashion on "casual" Friday stated a viable claim of discrimination. Although Complainant acknowledged that he was provided with a light duty assignment as an accommodation, a fair reading of his complaint indicated that he was claiming he was subjected to ongoing harassment by his Supervisors and poor working conditions.

**Keck v. Dep't of Transp., EEOC Appeal No. 0120113018 (November 7, 2011).**

The Agency improperly dismissed Complainant's claim alleging an on-going hostile work environment. While the Agency focused on one specific incident, Complainant alleged that he was "denied work opportunities, harassed, insulted and ostracized." In addition, Complainant alleged that Managers frequently asked when he planned to retire making him feel that he was being pressured to leave because of his age. The allegations were sufficient to state a viable claim of discriminatory hostile work environment.

**Summary Judgment**

Complainant, a Transportation Security Screener, filed a formal EEO complaint alleging, among other things, that the Agency discriminated against him when it did not select him for three positions. Following an investigation, the AJ issued a decision without a hearing finding no discrimination. The AJ found, in part, that Complainant did not demonstrate that he applied for the positions. On appeal, the Commission concluded that the record was not sufficiently developed for summary disposition. Specifically, the record contained little or no documentation relevant to two of the positions, and did not include copies of the vacancy announcements, or the submitted applications. The Commission noted that management's testimony that Complainant was not on the list of persons certified which "could mean" that he did not apply provided nothing more than speculation as to whether Complainant applied for the positions. Further, Complainant definitively stated that he did apply for the positions. The Commission stated that, at the summary judgment stage, Complainant's statement must be believed given the lack of documentary evidence in the record confirming whether or not Complainant applied for the position. Thus, the Commission remanded the matter for an administrative hearing. **LeGrant v. Dep't of Homeland Sec., EEOC Appeal No. 0120102728 (January 12, 2012).**

Complainant was hired as a Registered Nurse, subject to a one-year probationary period. According to the record, a patient's wife requested that a Licensed Practical Nurse (N1) provide her husband with pain medication. Complainant was not assigned to provide direct care to the patient, but was present when the request was made. N1 told the patient's wife that her husband would have to go to the nurses' station to get the medication, and an argument ensued. The Associate Chief Nurse stated that the wife reported the incident, and told him that Complainant and N1 were rude to her and her husband. In addition, the record contained a Report of Contact reflecting a patient/family complaint about the matter. An Administrative Board of Investigation (AIB) concluded that there was no evidence that Complainant or N1 abused or breached the "therapeutic boundaries" toward the patient or his wife. The AIB did note, however, that



Complainant and N1 did use poor judgment in addressing the request. Complainant was subsequently removed from his position, and filed a formal complaint of sex and age discrimination. N1 was not terminated over the incident.

Following an investigation, the AJ issued a decision without a hearing in favor of the Agency. On appeal, the Commission found that there were material facts in dispute that required resolution at a hearing. The Commission stated that the AJ's conclusion unduly narrowed the disparate treatment analysis, and focused on minor distinctions between Complainant's and N1's job descriptions rather than the conduct deemed comparable under the circumstances of the case. Further, while the AJ found that Complainant "directly supervised" N1, Complainant asserted that he was not acting as N1's supervisor and presented evidence that a Charge Nurse was present at the time in question. Further, Complainant argued that N1 had a pattern of misconduct involving patient abuse, and that the Agency ignored the misconduct of a younger, female employee and targeted him as an older male nurse. Complainant also noted that there were discrepancies in the Associate Chief Nurse's statements regarding whether N1 was disciplined, as well as the reasons given by the Agency for his termination. The Commission concluded that there was conflicting evidence on the critical issues of the disparity in discipline between Complainant and N1, and whether Complainant was directly supervising N1. Further, the Commission stated that it was not appropriate in a grant of the Agency's motion for summary judgment to resolve the conflicts in the Agency's favor. Thus, the matter was remanded for a hearing. **O'Neal v. Dep't of Veterans Affairs, EEOC Appeal No. 0120112690 (January 11, 2012).**

Complainant, a Housing Management Specialist, filed a formal EEO complaint alleging that the Agency discriminated against him on the basis of his race and in reprisal for prior EEO activity when it did not select him for a Management and Program Analyst position. According to the record, Complainant was one of six candidates forwarded for consideration by a five-member panel, but was not chosen for an interview. The Selecting Official ultimately chose the Selectee who was recommended by the panel. Following a request for a hearing, an AJ granted the Agency's motion for summary judgment and issued a decision finding no discrimination. On appeal, the Commission found that there was a genuine issue in dispute as to whether the action was taken in retaliation for Complainant's prior EEO activity. Complainant stated that, during several conversations with one of the Panel Members, he was asked if filing a prior EEO complaint was the "right" or "sensible" action to take, and if Complainant would take the same action again. Complainant further stated the Panel Member questioned him regarding the outcome of the prior complaint, and seemed to dislike him after the prior Responsible Official left the Agency. The Panel Member acknowledged that he was aware of Complainant's prior EEO activity, and paid the costs associated with Complainant's EEO complaint while serving as Budget Manager. While the Panel Member stated that Complainant's EEO activity had nothing to do with his decision not to recommend Complainant, the Commission found a "glaring omission" in the record, specifically, the Investigator's failure to ask the Panel Member whether he made the statements described by Complainant. The Commission found that there were questions about the Panel Member's motive which should be explained at a hearing under cross examination given that the remarks he allegedly made could be construed as a per se violation of the EEOC regulations. Thus, the issuance of a decision on summary judgment was inappropriate

and the matter was remanded for an administrative hearing. **Scott v. Dep't of Homeland Sec., EEOC Appeal No. 0120112890 (October 24, 2011).**

Complainant, a Mail Handler Equipment Operator, filed a formal EEO complaint alleging that the Agency discriminated against him on the bases of his age and disability when it required him to successfully qualify to operate and agree to operate three power industrial trucks (PITs) before permitting him to begin the assignment for which he was the successful bidder. Following an investigation, the AJ issued a decision without a hearing in favor of the Agency. According to the record, Complainant had been working in the same position for approximately 10 years, and the only PIT he operated was the mule, which Complainant noted was within his limitations. When Complainant submitted his bid, the posting indicated that the position required operating all three PITs, and Complainant's bid award indicated that it was pending qualification. Complainant requested to only work the mule as a reasonable accommodation and submitted documentation from his doctor, but the Agency would not permit Complainant to work in the bid position unless he could operate all three PITs.

On appeal, the Commission found that the AJ erred in finding that there was no genuine issue of material fact in the case. Specifically, Complainant disputed the Agency's assertion that the duties of the bid position required the operation of a PIT other than the mule. The employee who was allegedly covering the bid indicated that he only operated the mule. This employee worked the same daily schedule as Complainant's bid award. Complainant stated that another employee who occupies the same position did not operate any PITs most of the time, and that an increase in mail volume had also increased the need for mules. The Commission found that this evidence raised a genuine issue of fact as to whether the essential function of Complainant's bid award was to operate a PIT other than the mule. Thus, the matter was remanded for a hearing. **Farkas v. U.S. Postal Serv., EEOC Appeal No. 0120112686 (October 24, 2011).**

### **Timeliness**

Complainant filed a formal EEO complaint alleging that the Agency discriminated against him on the basis of his age when he resigned in lieu of termination. The Agency dismissed the complaint as untimely. On appeal, the Commission noted that while Complainant received the notice of right to file a formal complaint in November 2010, he did not file his formal complaint until April 2011. The Commission stated, however, that Complainant asserted that he felt discouraged from continuing his complaint after talking with the EEO Counselor. Complainant contacted his Senator regarding the matter, and, as a result of the Senator's inquiry, the EEO Counselor admitted telling Complainant that the EEO complaint process can be burdensome and time consuming. Subsequently, another Counselor contacted Complainant and sent him a second formal complaint form on April 8, 2011. Complainant was told at this time that he must file the complaint form with the Complaints Processing Center, and he did so on April 11, 2011. The Commission concluded that Complainant did not sit on his rights in this matter, promptly sought assistance from his Senator, and submitted his complaint form to the Complaints Processing Center in a timely manner when instructed to do so. Thus, the Commission exercised its discretion and excused Complainant's untimely filing. **Rush v. Dep't of Homeland Sec., EEOC Appeal No. 0120113868 (January 23, 2012).**

Complainant, a Probationary Management Assistant, filed a formal EEO complaint alleging that the Agency discriminated against her on the basis of her sex when it terminated her from her position. The Agency dismissed the complaint for failure to timely contact an EEO Counselor, stating that Complainant initiated EEO contact on September 15, 2011, which was more than 45 days after her December 2010 termination. On appeal, the Commission initially noted that the record supported a finding that Complainant contacted an Agency EEO office at the number listed in the termination letter as early as December 2, 2010, with the intent to pursue the EEO complaint process. At that time, Complainant spoke with the EEO Specialist, the same person who conducted her employee training program about the EEO process when she joined the Agency, and discussed filing an EEO complaint. Complainant asserted that the EEO Specialist dissuaded her from filing a complaint because she was a probationary employee, and advised her to contact the Employee Relations Specialist or the union to file a grievance. Complainant submitted a telephone log reflecting various contacts with the Agency EEO office in December 2010. The Commission found that Complainant followed the directions from the Agency and contacted the EEO office, which misdirected her from timely contacting an EEO Counselor. Thus, Complainant was entitled to a waiver of the time limit to contact a Counselor. **Phillips v. Dep't of Veterans Affairs, EEOC Appeal No. 0120120243 (March 7, 2012).**

Complainant contacted an EEO Counselor on December 9, 2009, and subsequently filed a formal complaint alleging that the Agency discriminated against him when it terminated his employment effective January 23, 2009. The Agency dismissed the complaint for failure to timely contact an EEO Counselor. On appeal, the Commission found that Complainant presented a persuasive argument for extending the applicable limitation period. Specifically, Complainant asserted that her previous Supervisor acted to prevent her from having access to EEO counseling. The EEO Counselor's report indicated that Complainant stated the Supervisor would not allow her to see an EEO Counselor or provide her with any contact information. While the EEO Counselor's report referenced a reduction in force letter that purportedly provided Complainant with EEO rights, the letter was not part of the record. **Poitra v. Dep't of the Interior, EEOC Appeal No. 0120111995 (November 10, 2011).**

Complainant contacted an EEO Counselor, and subsequently filed a formal complaint on January 21, 2011, alleging that the Agency discriminated against him with regard to an assignment. The Agency dismissed the complaint as untimely, stating that Complainant received the Notice of Right to File a Formal Complaint December 21, 2010. According to the record, the EEO Counselor sent the notice to Complainant via the United Parcel Service (UPS), and the Agency submitted information showing that a UPS package was delivered to Complainant's home address on December 21, 2010. Complainant, however, stated that neither he nor his wife received the notice on that date. On appeal, the Commission stated that the signature on the UPS delivery notice was not legible, and it was unclear who received the Notice. Complainant indicated that he contacted the EEO Counselor on January 14, 2011, after he did not receive a Notice. Thus, the Commission found that Complainant's formal complaint was filed in a timely manner. **Goodson v. Dep't of Veterans Affairs, EEOC Appeal No. 0120112431 (March 14, 2012).**

Complainant filed a formal EEO complaint on August 4, 2010, alleging that the Agency discriminated against her when it ignored her medical documentation and denied her reasonable

accommodation. According to the record, the Agency mailed Complainant a notice of her right to file a formal complaint which was received at Complainant's address of record on July 1, 2010. Therefore, the Agency dismissed the complaint as untimely. On appeal, the Commission noted that, generally, a certified mail return receipt signed by an individual at the Complainant's residence on a certain date establishes a presumption of constructive receipt by the Complainant on that date. In this case, however, Complainant stated that her 15-year old daughter signed for the notice. The Commission found that Complainant's daughter was not a household member of suitable age and discretion to accept important legal documents. Further, Complainant promptly responded to the Agency's notice once she was made aware of it on August 1, 2010. Thus, the Commission found adequate justification for excusing Complainant's untimely filing of her formal complaint. **Meza v. U.S. Postal Serv., EEOC Appeal No. 0120103757 (January 24, 2012).**

Complainant filed a formal EEO complaint on April 1, 2011, alleging that the Agency discriminated against him when it assigned him work beyond his physical limitations, subjected him to harassment, and gave him a letter of warning. The Agency dismissed the complaint as untimely, stating that Complainant received the notice of right to file on March 14, 2011, as evidenced by information found through the "track and confirm" on the Postal Service website. On appeal, the Commission found insufficient evidence to show that Complainant actually received the notice of right to file on March 14. Specifically, the "track and confirm" print-out contained only a reference to a delivery made to a specific city and zip code without any indication that Complainant actually received the notice. In addition, the Agency mailed a second copy of the notice to Complainant on March 17, 2011, which included a "certificate of service" presuming the parties received the notice within five days of mailing. The Agency stated that it sent the second mailing because Complainant had not picked up the first notice in a timely manner. The Commission concluded that the Agency could not conclusively show that Complainant received the first mailing, and the formal complaint was timely filed in accordance with the second mailing. **Foley v. Dep't of Def., EEOC Appeal No. 0120113250 (October 19, 2011), request for reconsideration denied, EEOC Request No. 0520120105 (May 4, 2012);** see also Coulter v. U.S. Postal Serv., EEOC Appeal No. 0120112913 (October 20, 2011) (Complainant's formal complaint was found to be timely where the "track/confirm" documents for the notice of right to file did not expressly identify the addresses of record of either Complainant or his Attorney, and there was no evidence of signatures by either individual that would reflect receipt of the notice on a particular date. Further, the formal complaint was transmitted in an envelope with an illegible postmark and was date-stamped by the Agency as having been received within five days of the applicable limitation period).